RECORD AND BRIEFS

No. 16-6795

Supreme Court, U.S.
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In The
Supreme Court of the United States

CARLOS MANUEL AYESTAS,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF THE CAPITAL PUNISHMENT CENTER OF THE UNIVERSITY OF TEXAS AT AUSTIN SCHOOL OF LAW IN SUPPORT OF THE PETITIONER

JORDAN M. STEIKER*
JIM MARCUS
THEA POSEL
RAOUL D. SCHONEMANN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS SCHOOL OF LAW
727 East Dean Keeton Street
Austin, TX 78705
(512) 232-1346
JSteiker@law.utexas.edu
JMarcus@law.utexas.edu
TPosel@law.utexas.edu
RSchonemann@law.utexas.edu

Attorneys for Amicus Curiae
* *Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964

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INTEREST OF *AMICUS CURIAE*[1]

This *amicus curiae* brief is submitted by the Capital Punishment Center of the School of Law of the University of Texas at Austin ("the Center"). The Center was established in 2006 to promote research and training in death penalty law. The Center sponsors academic events, pursues research projects concerning the administration of the death penalty, particularly in Texas, and houses the Capital Punishment Clinic, which provides direct representation and assistance to indigent prisoners on Texas's death row. Faculty within the Center teach courses on capital punishment law, capital defense representation, and capital trial preparation.

The Center's concern in this case stems from its commitment to comprehensive mitigation investigation in capital cases. As this Court has noted numerous times, such investigation is critical to a fair assessment of appropriate punishment. Diligent investigation often uncovers facts crucial to gauging a defendant's moral culpability for his or her offense.

Unfortunately, capital trial lawyers in Texas too often have failed in their basic investigative obligations. In such cases, the jury is left to decide between

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for both parties have issued blanket consent to the filing of *amicus curiae* briefs in support of either party.

life and death on the basis of incomplete and inaccurate information. When state habeas counsel subsequently fails as well to uncover relevant mitigating evidence, the sole avenue for recourse is federal habeas corpus. This case will determine whether death-sentenced inmates who received inadequate representation throughout state court proceedings will be afforded a meaningful opportunity to litigate their ineffective assistance of counsel ("IAC") claims in federal court. If the bar to funding under 18 U.S.C. § 3599(f) is set too high, above the "reasonably necessary" standard set forth in the statute, many death-sentenced inmates will proceed to execution without any adequate mitigation investigation in their cases.

This brief will not focus directly on the question of funding under § 3599(f). Rather, the Center focuses on two features of the Fifth Circuit's IAC jurisprudence relied upon to deny funding in this case: the belief that mitigation cannot affect outcomes in highly aggravated cases and the assumption that a client's reluctance to pursue particular lines of investigation relieves trial counsel of all professional duties regarding the investigation and presentation of mitigating evidence. The first proposition – that mitigation cannot affect outcomes in highly aggravated cases – runs directly against this Court's decisions, professional norms, and the experience of capital litigators. Perhaps equally important, this position discourages lawyers from fulfilling their professional obligations whenever faced with an aggravated capital crime. The second proposition – that capital trial lawyers should cut

short their mitigation investigation whenever a client expresses concerns about contacting particular witnesses – is likewise contrary to long-recognized professional norms and this Court's Sixth Amendment jurisprudence. Capital trial lawyers must build strong relationships with their clients to earn their trust and facilitate robust mitigation investigation; when clients resist particular lines of mitigation inquiry, as they often do, lawyers are still obligated to undertake comprehensive mitigation efforts. Such efforts are required not simply to protect their clients; uncovering and presenting mitigating evidence protects the community interest by avoiding the imposition of a death sentence contrary to prevailing community values.

Perhaps the two most important and distinctive features of the modern American death penalty are the creation of a separate phase in capital trials to assess punishment (bifurcation) and the recognition of a robust right to individualized sentencing. These complementary features of contemporary capital schemes ensure that jurors are able to make nuanced, contextual judgments about whether a particular defendant deserves to live or die. For our system to work, capital trial lawyers must take seriously their obligations to develop a mitigation case. The Center's commitment to educating students and training lawyers about this critical function motivates its participation in this case.

SUMMARY OF ARGUMENT

In its decision upholding the denial of funding under § 3599(f), the Fifth Circuit concluded that potential evidence of Petitioner's mental illness and history of drug dependence was "not substantially likely" to have affected the outcome of his trial in light of the "brutality of the crime." This conclusion is astonishing in as much as the evidence has not yet been discovered or presented (hence the request for funding). The Fifth Circuit did not make a judgment that *particular* mitigation evidence it reviewed was insufficient to overcome the aggravating aspects of the offense; it asserted that *any* evidence subsequently discovered would be insufficient – whatever it might be.

The Fifth Circuit's conclusion rests on a longstanding fallacy in its approach to IAC claims: that mitigation simply does not matter in cases it characterizes as "brutal" or highly aggravated. This Court's decisions have explicitly and implicitly rejected the Fifth Circuit's position in numerous cases, finding prejudice where trial counsel failed to uncover powerful mitigating evidence, notwithstanding the presence of significant aggravation. These decisions make clear that the question of prejudice should focus primarily on the nature and significance of the *mitigating* evidence trial counsel failed to uncover and present. Such an approach is consistent with professional norms and practical experience. Lawyers are duty-bound to pursue mitigation strategies notwithstanding significant aggravation, and trial practice confirms that mitigation investigation can yield fruit by preventing the

imposition of death even in challenging cases. For this reason, it is inappropriate for federal courts to deny funding under § 3599(f) by forecasting insufficient prejudice, because such courts are invariably in a poor position to make that assessment.

In its initial decision, the Fifth Circuit endorsed the district court's view that trial counsel could not be deemed ineffective because Petitioner was initially reluctant to have counsel contact his relatives. The Fifth Circuit rejected the idea that counsel must pursue other avenues for mitigation in such circumstances, consistent with the Fifth Circuit's general approach excusing counsel from mitigation investigation whenever a client is unhelpful to the investigation. The Fifth Circuit's decisions go well beyond this Court's holding in *Schriro v. Landrigan*, 550 U.S. 465, 477 (2007), which rejected an IAC claim where the defendant adamantly and on the record "refused to allow the presentation of any mitigating evidence." This Court's decisions confirm that trial counsel must pursue reasonable lines of mitigation investigation even if a client is unhelpful or uncooperative in some respects.

Ultimately, the Fifth Circuit modified its original opinion because it was predicated on the mistaken assertion that counsel had procured a psychological examination of Petitioner prior to trial. Its revised opinion does not rely on the absence of deficient performance, but solely on its view regarding the lack of prejudice. Nonetheless, the argument that counsel could not be deemed deficient because Petitioner was

initially reluctant about contacting his relatives misstates the operative law and undercuts the professional responsibilities of capital trial attorneys. To the extent the district court relied on Petitioner's reluctance to contact family members to excuse trial counsel's unprofessional investigation, the district court was in error.

ARGUMENT

THE FIFTH CIRCUIT'S INAPPROPRIATELY RESTRICTIVE APPROACH TO FUNDING APPLICATIONS UNDER 18 U.S.C. § 3599(F) RESTS ON TWO FUNDAMENTAL, RECURRING ERRORS IN ITS SIXTH AMENDMENT JURISPRUDENCE: ITS BELIEF THAT MITIGATION CANNOT AFFECT OUTCOMES IN HIGHLY AGGRAVATED CASES AND ITS ASSUMPTION THAT A CLIENT'S RELUCTANCE TO PURSUE PARTICULAR LINES OF INVESTIGATION RELIEVES TRIAL COUNSEL OF ALL PROFESSIONAL DUTIES REGARDING THE INVESTIGATION AND PRESENTATION OF MITIGATING EVIDENCE.

A. A "brutal crime" does not preclude a finding of prejudice arising from counsel's failure to conduct an adequate mitigation investigation.

The panel opinion upholding the denial of funds essentially creates a "brutal crime" exception to funding under § 3599(f). Under the Fifth Circuit's approach, if a crime is sufficiently aggravated, funding can be withheld because any mitigation investigation would be superfluous: the aggravation of the crime is

sufficient to deny relief on the underlying IAC claim. Apart from its unsustainability as a reading of the "reasonably necessary" language in § 3599(f), this line of reasoning reveals a longstanding error in the Fifth Circuit's approach to IAC claims.

The Fifth Circuit consistently denies relief even in cases where trial counsel failed to uncover and present powerful mitigating evidence. *Santellan v. Cockrell*, 271 F.3d 190, 198 (5th Cir. 2001) (concluding, in light of the defendant's dangerousness and the "horrific nature" of the offense, that there was "no substantial likelihood that the outcome of the punishment phase would have been altered by evidence that [the defendant] suffered organic brain damage"); *Vasquez v. Thaler*, 389 Fed.App'x 419, 429 (5th Cir. 2010) (rejecting prejudice where trial counsel failed to develop and present evidence of post-traumatic stress disorder, fetal alcohol syndrome, and a borderline IQ given "overwhelming evidence of guilt" and the "brutality" of the offense); *Clark v. Thaler*, 673 F.3d 410, 421-25 (5th Cir. 2012) (stating that the aggravating evidence in the case was overwhelming, thus making it "virtually impossible to establish prejudice" under circuit case law, notwithstanding extensive evidence of childhood abuse and trauma) (internal quotation marks and citation omitted). The Fifth Circuit's opinion in *Ladd v. Cockrell*, 311 F.3d 349 (5th Cir. 2002), is representative of the court's insistence that significant mitigation is irrelevant in the context of a highly aggravated case. Ladd's trial attorney had failed to uncover and present evidence of Ladd's diagnosis of mental retardation as

a child as well as his "troubled childhood." *Id.* at 360. The Fifth Circuit acknowledged that trial counsel's performance might have been deficient (and that the state court's contrary conclusion might have been unreasonable). It nonetheless denied relief based on the absence of prejudice, asserting that when evidence of future dangerousness is "overwhelming," it is "virtually impossible to establish prejudice." *Id.* Though *Ladd* cited to this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), for that proposition, nothing in *Strickland* offers support. In *Strickland*, this Court carefully assessed the strength of the *mitigating* evidence to make a judgment about prejudice, finding that the "evidence that [Strickland] says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge." *Id.* at 699-700. In fact, in the context of that case, this Court noted that introduction of the purportedly mitigating evidence "might even have been harmful" to his cause. *Id.* at 700.

Subsequent decisions by this Court confirm that the prejudice inquiry for IAC claims must evaluate the strength and significance of the *mitigating* evidence trial counsel failed to discover, even in highly aggravated cases. In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court found unreasonable the state court's assessment of prejudice. Williams had been sentenced to death for killing his victim with a mattock after the victim refused to lend him a couple of dollars. Williams

also had committed numerous other offenses, including violent assaults on elderly persons after the commission of his capital murder. *Id.* at 368 (noting that Williams had "brutally assaulted" an elderly woman leaving her in a "vegetative state"). Williams also had been convicted of setting a fire in jail while awaiting his capital trial. *Id.* Much like the approach in the Fifth Circuit, the Fourth Circuit had reversed a grant of relief on Williams' IAC claim in part because the evidence of Williams' future dangerousness was "simply overwhelming," *Id.* at 374. This Court, though acknowledging and detailing the extensive aggravation in Williams' case, held that an assessment of prejudice must take account of the *mitigating* evidence that should have been presented: "Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 398. Because the state court "did not entertain that possibility," that court "failed to accord appropriate weight to the body of mitigation evidence available to trial counsel." *Id.*

Likewise, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court granted IAC relief in the context of a crime similar to the one presently before the Court: the victim, an elderly woman, was found drowned in the bathtub of her ransacked apartment. *Id.* at 514. After determining that trial counsel had conducted an unreasonable mitigation investigation, this Court turned to the question of prejudice, making clear that the

determination of prejudice must account for *both* evidence in aggravation and evidence in mitigation. *Id.* at 534 ("[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence"). Because the "mitigating evidence counsel failed to discover and present" was "powerful," this Court held "that had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." *Id.* at 536. After all, in Wiggins' case, as in Texas, a death verdict requires unanimity; prejudice is thus established if "there is a reasonable probability that at least one juror [who] would have struck a different balance" in light of the undiscovered mitigating evidence. *Id.* at 537.

In *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court again granted IAC relief in the context of another highly aggravated crime, one in in which the defendant had repeatedly stabbed his victim and set him on fire, with the jury finding that "the murder was committed by torture." *Id.* at 378. Reversing the denial of petitioner's IAC claim, this Court determined that his trial attorneys were deficient in failing to examine a readily available file relating to a prior conviction, a file that yielded important mitigating evidence. Despite the aggravated nature of the offense, including the presence of torture, this Court found "beyond any doubt that counsel's lapse was prejudicial," *id.* at 390, because the mitigating evidence subsequently discovered "add[ed] up to a mitigation case that [bore] no relation to the few naked pleas for mercy actually put

before the jury." *Id.* at 393. Unlike the Fifth Circuit, which routinely holds that significant aggravation ends the inquiry, this Court stated exactly the opposite: "It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Rompilla's culpability." *Id.* (internal quotation marks and citations omitted); *accord Sears v. Upton*, 561 U.S. 945 (2010) (summarily reversing finding of no prejudice in case where defendant had kidnapped, raped and murdered his 59-year-old victim after punching her in the face with brass knuckles and handcuffing her in the backseat of a car).

Williams, Wiggins, Rompilla, and *Sears* abundantly demonstrate that an assessment of prejudice cannot be made without knowing the extent of the mitigating evidence that could have been found and introduced at the time of trial.[2] All of these cases involved brutal, senseless murders, and all are appropriately characterized as highly aggravated. Yet in each case, this Court never suggested that it is "virtually impossible" to establish prejudice because of the presence of significant aggravation; instead, in each case the Court

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[2] This is particularly true in Texas, where capital sentencing juries are not asked to weigh aggravating factors against mitigating circumstances. Instead, jurors respond to a "special issue" asking whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." Tex. Code Crim. Proc. art. 37.071, § 2(e). If one juror answers this question affirmatively, the defendant is sentenced to life. *Id.* § 2(g).

determined that the strength of the undiscovered mitigation was sufficient to find prejudice under the Sixth Amendment.

This Court's belief that mitigation evidence might well influence a jury's appraisal of a defendant's culpability, even in high aggravation cases, is vindicated by experience. The worst crimes do not invariably produce capital sentences, especially when trial lawyers provide persuasive evidence of reduced culpability. James Holmes, who killed twelve and injured seventy others in the Aurora theater massacre, was spared death after expert witnesses testified to his serious mental illness, offering diagnoses of schizotypal personality disorder and schizoaffective disorder. Even though the jury had rejected his insanity defense, it did not unanimously support a sentence of death, and Holmes was sentenced to life without possibility of parole. Noelle Phillips & Jordan Steffen, *Juror Says One Said No to Death*, Denver Post, Aug. 8, 2015, at A4. In a recent Dallas County, Texas case involving four murder victims and four severely injured children, the jury did not impose death after trial attorneys presented significant mitigating evidence regarding the defendant's mental illness, mismanagement of his medication at the time of the offense, and subsequent good behavior awaiting trial. Tasha Tsiasperas, *Is the Death Penalty Dying in Dallas County?*, Dallas Morning News, June 3, 2017, *available at* 2017 WLNR 17158104.

The Fifth Circuit's insistence that no amount of mitigation could overcome the aggravation in this case

is especially troublesome given the sparse record regarding the crime. On direct appeal, the Texas Court of Criminal Appeals ("CCA") acknowledged that the conviction rests "primarily on circumstantial evidence" and the record does not reveal whether Petitioner actually killed the victim. Joint Appendix ("JA") at 128. In sustaining Petitioner's conviction against a sufficiency challenge, the CCA concluded that adequate evidence established Petitioner's guilt under the "law of parties": a rational trier of fact could conclude "that appellant either murdered the victim or participated in the crime by promoting or assisting its commission." JA 129. The absence of a clear picture of Petitioner's participation in the offense – including whether he even caused or intended the victim's death – is a far cry from the kinds of aggravation in *Williams, Wiggins, Rompilla*, and *Sears* (intentional brutal assault of an elderly victim, intentional drowning of elderly victim, murder by torture, and murder accompanied by kidnapping and rape, respectively) that this Court deemed insufficient to preclude a finding of prejudice. Moreover, Petitioner's request for funding rests in part on evidence of his substantial mental health issues, including a diagnosis of schizophrenia following a psychotic episode, ROA 770-74;[3] JA 144-48, as well as evidence of substance abuse. Evidence of significant mental impairment is precisely the sort of evidence that "might well have influenced the jury's appraisal" of Petitioner's culpability. At the punishment phase,

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[3] "ROA" citations refer to the Record on Appeal in *Ayestas v. Stephens*, No. 15-70015 (5th Cir. May 14, 2015).

the state implicitly acknowledged as much when the prosecutor asked the jury in closing argument: "Does he have anything there that would lead you to conclude there is some type of mitigation, anything at all? There is no drug problem. There's no health problem. There is no alcohol problem." ROA 4747. Trial counsel's failure to uncover mitigating evidence was thus used to secure Petitioner's death sentence, and the Fifth Circuit's confidence that mitigation was unlikely to affect the outcome is belied by the prosecution's own presentation of its case.

B. A client's initial hesitation about contacting certain family members does not excuse counsel from conducting a professionally adequate mitigation investigation.

In its revised opinion, the panel relied wholly on its mistaken prejudice analysis in finding the merits of Petitioner's IAC claim not viable. JA 404. But both the district court and the panel in its initial opinion emphasized as well their view that Petitioner could not assert deficiency in trial counsel's mitigation investigation because Petitioner at one point "instructed counsel not to call" certain members of his family in Honduras. JA 364. Petitioner disputed trial counsel's claim that he instructed her not to contact those family members, JA 159, and there are reasons to be skeptical of trial counsel's account, given that she amended her

sworn testimony in light of its inconsistency with provable facts.[4] But even accepting trial counsel's account, despite Petitioner's initial reluctance to have certain members of his Honduran family contacted because of inter-family problems, he ultimately supported such contact. JA 162 (the defendant "stated that he did not want his family contacted due to problems he and his family had in his home country" but he acquiesced in such contact "before jury selection began"). Trial counsel never claimed that Petitioner interfered with the introduction of mitigating evidence or requested that such evidence be withheld; nor did Petitioner direct counsel not to contact *other* members of his family (who resided in the United States), whom trial counsel failed to contact as well. The record reveals virtually no investigation regarding mitigation until just before trial, with over a year of inactivity, despite the appointment of an investigator; the investigation that was undertaken consisted mostly of a few letters and phone calls, with no direct conversations with any member of Petitioner's family (or even any of his friends and acquaintances). The lack of contact was all the more unreasonable because trial counsel had learned from a questionnaire that Petitioner had experienced several head traumas and subsequent headaches, ROA 687-88, and had longstanding problems with drugs, including at the time of the offense. *Id.* Nonetheless, trial

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[4] In her original affidavit, trial counsel claimed that Petitioner did not approve her contacting his family until "after jury selection was completed," JA 154, but she was shown to have contacted the family more than two weeks before the start of jury selection. JA 162.

counsel's entire punishment phase mitigation presentation lasted about two minutes, with no live testimony and simply the introduction of letters addressing Petitioner's attentiveness in a prison English class. JA 47-49. The jury was left with essentially no information about Petitioner's background, impairments, or substance abuse, and the prosecution highlighted the absence of explanation for Petitioner's conduct as a reason to impose the death penalty.

On these facts, Petitioner's initial reluctance to have certain members of his family contacted could not excuse trial counsel's demonstrable failure to conduct a professional mitigation investigation. But the district court and the panel relied on Fifth Circuit case law that treats any resistance regarding mitigation investigation by a capital defendant as adequate grounds for rejecting an IAC claim. *Carty v. Thaler*, 583 F.3d 244, 263-66 (5th Cir. 2009) (holding that Carty's "obstreperousness" and "obfuscation" contributed to and therefore excused counsel's failure to learn that the defendant was a foreign national and to contact available witnesses in her home country); *Galloway v. Thaler*, 344 Fed. App'x 64 (5th Cir. 2009) (excusing counsel's failure to investigate and uncover evidence of childhood abuse because the defendant was hesitant to cast his father in a negative light). Indeed, the Fifth Circuit appears to take an extreme view, that a capital defendant bears the burden of directing the mitigation investigation, such that "a defendant who does not provide any indication to his attorneys of the availability

of mitigating evidence may not later assert an ineffective assistance claim." *Wiley v. Puckett*, 969 F.2d 85, 99-100 (5th Cir. 1992); *Byrne v. Butler*, 845 F.2d 501, 513 (5th Cir. 1988) (counsel was not ineffective for failing to uncover evidence of defendant's mental disorder because petitioner did not "intimate[] to his attorneys that he was suffering from a mental disorder").

The Fifth Circuit's approach finds no shelter in this Court's decision in *Schriro v. Landrigan*, 550 U.S. 465 (2007). In *Landrigan*, trial counsel had conducted a mitigation investigation and sought to introduce pertinent mitigating evidence at trial. The defendant interfered with the presentation of evidence, instructed his attorney not to present it, and told the trial court on the record that he did not want the mitigation presentation to proceed. *Id.* at 469. Because the defendant "refused to allow the presentation of any mitigating evidence" at his trial, he could not have prevailed on an IAC claim, because "regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence." *Id.* at 477. Nothing in *Landrigan* suggests that trial counsel is relieved of investigative responsibilities because of a defendant's reluctance to pursue certain avenues of mitigation; the decision turned entirely on the absence of prejudice given that the defendant was unwilling to permit its introduction under any circumstances. Moreover, *Landrigan* involved an extreme case of client resistance. The defendant did not merely fail to assist in the investigation or ask his

attorney not to interview certain witnesses; he actively resisted his lawyers' efforts and forbade them from introducing *any* mitigation under *any* circumstances. As this Court observed (quoting from a lower court opinion): "In the constellation of refusals to have mitigating evidence presented . . . this case is surely a bright star." *Id.* at 477 (quotation marks and citation omitted).

Landrigan does not support the view that inadequate mitigation investigation can be justified by a client's reluctance to contact particular witnesses. Indeed, this Court's summary reversal in *Porter v. McCollum*, 558 U.S. 30 (2009), is strikingly similar to this case. There, as here, the defendant "instructed [counsel] not to speak" with particular family members. *Id.* at 40. Indeed, unlike Petitioner, Porter was described as "fatalistic and uncooperative." *Id.* But this Court found ineffective assistance of counsel because Porter's lawyer "failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service." *Id.* The fact that Porter had instructed counsel not to contact his ex-wife or son did not "obviate the need for defense counsel to conduct *some* sort of mitigation investigation," especially given that "Porter did not give him any other instructions limiting the witnesses he could interview." *Id.* Other circuits have likewise refused to transform *Landrigan* into a blank check for trial counsel to forego mitigation simply because a defendant has some misgivings with respect to particular witnesses or evidence. *See, e.g.*, *Blystone v. Horn*, 664 F.3d

397, 422-27 (3d Cir. 2011) (granting relief and distinguishing *Landrigan* despite an in-court waiver of mitigation presentation, observing that "[c]ounsel cannot avoid the consequences of his inadequate preparation simply by virtue of the serendipitous occurrence that, on the day of sentencing, his client stuck with the decision not to go forward with a mitigation case"); *Gray v. Branker*, 529 F.3d 220, 230-34 (4th Cir. 2008) (holding the state court's reliance on *Landrigan* unreasonable and counsel's performance ineffective despite Gray's statement that he didn't want to spend his own money on a psychiatric evaluation: "Nothing in *Schriro* permits Gray's statement to be used to relieve his counsel of their duty to investigate for mitigating mental health evidence."); *Hamilton v. Ayers*, 583 F.3d 1100, 1118-20 (9th Cir. 2009) (finding counsel's performance ineffective, emphasizing that *Landrigan* does not obviate counsel's responsibility to undertake mitigation investigation, and observing that "at most Hamilton refused to assist in his defense; he did not impede the many other avenues of mitigating evidence available to counsel"); *see also Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (holding counsel's failure to investigate sentencing phase evidence unreasonable despite the fact that "Rompilla was even actively obstructive" to the investigation).

This Court's approach is informed by professional norms for capital trial representation. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases require counsel to conduct a thorough and independent investigation

relating to the issues of both guilt and penalty, and "the investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. ed. 2003), Guideline 10.7(A)(2) (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1015 (2003) ("*ABA Guidelines*"). The commentary to the Guidelines makes clear that "[t]he duty to investigate exists regardless of the expressed desires of the client." Guideline 10.7, comment., 31 Hofstra L. Rev. at 1021 & n.206 (*citing Hardwick v. Crosby*, 320 F.3d 1127, 1190 n.215 (11th Cir. 2003) ("Even if Hardwick did ask [counsel] not to present witnesses at the sentencing proceeding, . . . [counsel] had a duty to Hardwick at the sentencing phase to present available mitigating witnesses as Hardwick's defense against the death penalty"); *Blanco v. Singletary*, 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow client to make an informed decision to waive mitigation)). The Guidelines recognize that defendants facing the death penalty often experience a mix of anxiety, embarrassment, and hopelessness which might cause them to hesitate to support a comprehensive mitigation investigation. These emotions will be especially powerful when the evidence to be uncovered involves traumatic experiences or the pursuit of such evidence might damage family relationships. Trial lawyers must develop trusting

relationships with their clients to work past these hesitations, which accounts in part for the separate Guideline requirement of extensive and meaningful client contact. *ABA Guidelines*, Guideline 10.5 ("Relationship with the Client"), reprinted in 31 Hofstra L. Rev. at 1005.

The Fifth Circuit's contrary approach encourages trial counsel to use a client's temporary resistance to mitigation investigation as a reason to abandon the mitigation effort entirely. Worse still, the golden bullet of a client's purported "obstreperousness" can provide a post hoc, self-serving explanation when trial counsel fails to pursue a professional mitigation investigation and is later confronted with a claim of ineffective representation.

In light of its recognition that trial counsel failed to conduct any mental health evaluation of Petitioner, the Fifth Circuit's corrected opinion does not ground its rejection of funding on Petitioner's initial qualms about contacting certain family members. JA 404. But the inclination to reject IAC claims based on such minimal expressions of client hesitation in other Fifth Circuit decisions, as well as the district court's inappropriate reliance on that ground in its funding denial, warrants this rebuttal.

CONCLUSION

Petitioner's trial attorneys waited until the last minute to prepare for trial, undertook rudimentary

mitigation investigation, and presented essentially no punishment-phase mitigation case, despite their awareness of Petitioner's multiple head traumas and history of substance abuse. The record offers little information about Petitioner's involvement in the offense, and the jury's conviction under the law of parties reflects uncertainty whether Petitioner actually killed the victim or intended her death. After trial, Petitioner was diagnosed with schizophrenia. Nonetheless, the Fifth Circuit denied funding to investigate Petitioner's IAC claim because of its assessment that his IAC claim is not viable. This conclusion rests on the implausible factual assertion that the "brutality" of the instant crime would have yielded a death sentence regardless of any mitigating evidence presented, including evidence of serious mental illness or the influence of drugs at the time of the offense. It rests also on the erroneous legal assertion that mitigating evidence – even where such evidence drastically reduces culpability on the part of a defendant – is unlikely to persuade even one juror to withhold death in cases involving significant aggravation. The Fifth Circuit's analysis cannot be reconciled with either this Court's decisions finding prejudice in cases involving substantially greater aggravation or with the professional norms and experience animating American death penalty law.

Nor can Petitioner's IAC claim be dismissed on the ground of his initial reluctance to have trial counsel contact certain relatives. That direction did not

amount to a blank check to forego mitigation investigation and cannot redeem trial counsel's failure to discover and introduce evidence which could have transformed the jury's appraisal of Petitioner's culpability. The Fifth Circuit's draconian approach in cases where trial lawyers claim their clients were uncooperative does not adhere to this Court's decisions and undermines important representational norms. Stripped of these mistaken articulations and applications of Sixth Amendment law, the denial of funding in this case cannot stand.

Equally important, if this Court were to reverse the denial of funding, there is a substantial risk that the litigation on remand would remain distorted by the inappropriate approaches to performance and prejudice contained in the district court and Fifth Circuit opinions. Those courts must recognize that powerful mitigating evidence can establish prejudice, even if they regard the crime as particularly brutal; and they must acknowledge that Petitioner's initial qualms about contacting certain family members do not estop

him from challenging trial counsel's failure to uncover and present mitigating evidence.

Respectfully submitted,

JORDAN M. STEIKER*
JIM MARCUS
THEA POSEL
RAOUL D. SCHONEMANN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton Street
Austin, TX 78705
(512) 232-1346
JSteiker@law.utexas.edu
JMarcus@law.utexas.edu
TPosel@law.utexas.edu
RSchonemann@law.utexas.edu

Attorneys for Amicus Curiae
* *Counsel of Record*